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9 *Attorneys for Plaintiffs and the Proposed Class*

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 ALAN BRINKER, AUSTIN RUGG, and
14 ANA SANDERS, individually and on behalf
15 of all others similarly situated,

16 Plaintiffs,

17 v.

18 NORMANDIN’S, a California corporation,
19 d/b/a NORMANDIN CHRYSLER JEEP
20 DODGE RAM, and ONECOMMAND, Inc.,

21 Defendants.

NO. 5:14-cv-03007-EJD-HRL

**THIRD AMENDED CLASS ACTION
COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMAND

HON. EDWARD J. DAVILA

Complaint Filed: July 1, 2014

DATE:

TIME:

LOCATION: Courtroom 4 – 5th Floor

22 Plaintiffs Alan Brinker, Austin Rugg, and Ana Sanders (hereinafter collectively referred
23 to as “Plaintiffs”), by their undersigned counsel, for this class action complaint against
24 Defendant Normandin’s d/b/a Normandin Chrysler Jeep Dodge Ram and its present, former, or
25 future direct and indirect parent companies, subsidiaries, affiliates, agents, and/or other related
26 entities, and Defendant OneCommand, Inc., and its present, former, or future direct and indirect
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1 parent companies, subsidiaries, affiliates, agents, and/or other related entities (collectively
2 referred to as “Defendants”) allege as follows:

3 **I. INTRODUCTION**

4 1. Nature of Action. Plaintiffs, individually and as class representatives for all
5 others similarly situated, bring this action against Defendants for violations of the Telephone
6 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

7 **II. PARTIES**

8 2. Plaintiff Alan Brinker. Plaintiff Alan Brinker (“Plaintiff Brinker”) is a citizen of
9 California, residing in Santa Clara County, California.

10 3. Plaintiff Austin Rugg. Plaintiff Austin Rugg (“Plaintiff Rugg”) is a citizen of
11 California, residing in San Mateo County, California.

12 4. Plaintiff Ana Sanders. Plaintiff Ana Sanders (“Plaintiff Sanders”) is a citizen of
13 California, residing in Santa Clara County, California.

14 5. Defendant Normandin’s d/b/a Normandin Chrysler Jeep Dodge Ram.
15 Normandin’s d/b/a Normandin Chrysler Jeep Dodge Ram (“Defendant Normandin”) is a
16 California corporation with its principal place of business in San Jose, California. Defendant is
17 registered to do and is doing business in California.

18 6. Defendant OneCommand. OneCommand (“Defendant OneCommand”) is a
19 Delaware corporation with its principal place of business in Mason, Ohio, which does business
20 throughout the United States, including in California.

21 **III. JURISDICTION AND VENUE**

22 7. Subject Matter Jurisdiction. This Court has subject matter jurisdiction over
23 Plaintiffs’ TCPA claims pursuant to 28 U.S.C. § 1331 because Plaintiffs’ TCPA claims arise
24 under the laws of the United States, specifically 47 U.S.C. § 227.

1 8. Personal Jurisdiction. This Court has personal jurisdiction over Defendants
2 because they do business in California, and the wrongful acts alleged in this Complaint were
3 committed in California. In addition, Defendant Normandin is a California corporation.

4 9. Venue. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) in that
5 a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this
6 District.

7 **IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 47 U.S.C. § 227**

8 10. In 1991, Congress enacted the TCPA in response to a growing number of
9 consumer complaints regarding certain telemarketing practices.

10 11. The TCPA makes it unlawful “to make any call (other than a call made for
11 emergency purposes or made with the prior express consent of the called party) using an
12 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone
13 number assigned to a ... cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii).

14 12. For calls made on or after October 16, 2013, the FCC requires written prior
15 consent for prerecorded telemarketing or advertising telephone calls. 47 C.F.R. § 64.1200(a)(2);
16 (f)(8); *see also In the Matter of Rules and Regs. Implementing the Tel. Consumer Prot. Act of*
17 *1992*, 27 F.C.C.R. 1830, 1874 (2012). “Prior written consent” means “an agreement, in writing,
18 bearing the signature of the person called that clearly authorizes the seller to deliver or cause to
19 be delivered to the person called advertisements or telemarketing messages using an automatic
20 telephone dialing system or an artificial or prerecorded voice, and the telephone number to which
21 the signatory authorizes such advertisements or telemarketing messages to be delivered.” 47
22 C.F.R. § 64.1200(f)(8). The written agreement must include “a clear and conspicuous disclosure
23 informing the person signing that: (A) By executing the agreement, such person authorizes the
24 seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic
25 telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required
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1 to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a
2 condition of purchasing any property, goods, or services.” 47 C.F.R. § 64.1200(f)(8).

3 13. The TCPA provides a private cause of action to persons who receive calls in
4 violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

5 14. Federal Communication Commission (“FCC”) promulgated regulations
6 “generally establish that the party on whose behalf a solicitation is made bears ultimate
7 responsibility for any violations.” *See* Rules and Regulations Implementing the Telephone
8 Consumer Protection Act of 1991, Memorandum and Order, 10 F.C.C. Rcd. 12391, 12397 ¶ 13
9 (1995).

10 15. The FCC confirmed this principle in 2013, when it explained that “a seller
11 may be held vicariously liable under federal common law principles of agency for violations of
12 either section 227(b) or section 227(c) that are committed by third-party telemarketers.” *See In*
13 *the Matter of the Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574 (2013).

14 V. FACTUAL ALLEGATIONS

15 A. Factual Allegations Regarding Defendants

16 16. Defendant Normandin owns and operates an automobile dealership in San Jose,
17 California, doing business as Normandin Chrysler Jeep Dodge Ram.

18 17. In addition to selling and leasing new and used automobiles, Defendant
19 Normandin’s website explains that their “services include trusted Chrysler Jeep RAM and Dodge
20 car repair” and offers “original Chrysler Jeep RAM and Dodge parts.” *See*
21 <http://www.normandinchryslerjeep.net/about-us/> (last visited July 25, 2017).

22 18. Defendant OneCommand is an automotive marketing and advertising company.
23 It holds itself out to be the “successful dealer’s secret weapon for delivering consistent results in
24 their Sales and Service departments.” *See* <http://www.onecommand.com/who-we-are> (last
25 visited July 25, 2017).

1 19. Every day, Defendant OneCommand “sends over 1,000,000 communications on
2 behalf of [its] clients.” *Id.*

3 20. Defendant Normandin contracted with Defendant OneCommand to increase the
4 volume of its customers.

5 21. Part of the Defendant OneCommand’s strategy for increasing the volume of
6 Defendant Normandin’s customers involves the use of telephone solicitation calls, including
7 ATDS generated and/or automated or prerecorded calls.

8 22. Defendant Normandin provides contact information from service center
9 customers, potential car buyers, and other leads to Defendant OneCommand for purposes of
10 telemarketing Defendant Normandin’s goods and services.

11 23. Defendant Normandin is legally responsible for ensuring that Defendant
12 OneCommand’s telephone solicitation activities comply with the TCPA, even if Defendant
13 Normandin does not make the calls itself.

14 24. The FCC concurs that sellers such as Defendant Normandin may not avoid
15 liability by outsourcing telemarketing because doing so “would leave consumers in many cases
16 without an effective remedy for telemarketing intrusions.” *In the Matter of the Joint Petition*
17 *Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6588 (2013).

18 25. Under the standards outlined in the FCC’s Order, and by other Courts interpreting
19 that Order, Defendant Normandin is directly liable to Plaintiffs and members of the Class as well
20 as vicariously liable through theories of agency such as actual authority and ratification.

21 26. Although Defendant OneCommand made the calls to Plaintiffs, Defendant
22 Normandin also participated in the calls by providing contact information and setting the
23 guidelines and parameters for customers who would be acceptable for Defendant OneCommand
24 to market Defendant Normandin’s services to.

25 27. Defendant Normandin ratified Defendant OneCommand’s actions by accepting
26 the benefits of Defendant OneCommand’s activities through accepting prospective customers
27 generated by Defendant OneCommand through its illegal telephone solicitation activities.

1 **B. Factual Allegations Regarding Plaintiff Brinker**

2 28. On or around March 2014, Plaintiff Brinker received a telephone call made by
3 Defendant OneCommand on behalf of Defendant Normandin on his cellular telephone.

4 29. The call consisted of a prerecorded message which provided:

5 Hello. I'm calling on behalf of Normandin Chrysler Jeep Dodge.
6 Our records show that you may have missed routine maintenance
7 that is recommended for your vehicle. Proper maintenance of your
8 vehicle is recommended by your manufacturer to insure its
9 performance and longevity. If we can answer any questions
10 regarding your vehicle's maintenance needs please contact us at
11 (408) 266-9500. Thanks very much and have a great day.

12 30. The prerecorded message did not specify which of Plaintiff Brinker's vehicles
13 was allegedly in need of routine maintenance.

14 31. Plaintiff Brinker did not provide prior express consent to receive prerecorded
15 telephone calls on his cellular telephone from either Defendant.

16 32. Defendant OneCommand made the above-described automated call.

17 33. Plaintiff Brinker's privacy has been violated by the above-described call from, or
18 on behalf of, Defendants and it constitutes a nuisance as it is annoying and harassing.

19 34. Defendants, in concert, have made thousands of automated and/or prerecorded
20 calls to persons on their cellular telephones in California and throughout the United States.

21 35. Defendants intend to continue to make similar automated and/or prerecorded calls
22 to persons on their cellular telephones in California and throughout the United States.

23 **C. Factual Allegations Regarding Plaintiff Rugg**

24 36. Plaintiff Rugg is, and at all times mentioned herein was, a "person" as defined by
25 47 U.S.C. § 153(39).

26 37. In or around 2014, Plaintiff Rugg had his vehicle serviced by Defendant
27 Normandin.

1 38. After having his vehicle serviced in 2014, Plaintiff Rugg received approximately
2 five (5) telephone solicitation calls on his cellular telephone, number (408) 309-XXXX, made by
3 Defendant OneCommand on behalf of Defendant Normandin.

4 39. Each of the calls was initiated for purposes of marketing Normandin's services.

5 40. Each of the calls consisted of a prerecorded message stating words to the effect
6 that Plaintiff Rugg's vehicle was overdue for service.

7 41. On information and belief, the script of prerecorded message was very similar, or
8 identical, to the message in paragraph 29, above.

9 42. Defendant OneCommand made the above-described automated and/or
10 prerecorded calls.

11 43. Plaintiff Rugg did not provide prior express consent to receive automated and/or
12 prerecorded calls on his cellular telephone from, or on behalf of, Defendants.

13 44. Plaintiff Rugg's privacy has been violated by the above-described calls from, or
14 on behalf of, Defendants and they constitute a nuisance as they are annoying and harassing.

15 45. Defendants, in concert, have made thousands of automated and/or prerecorded
16 calls to persons on their cellular telephones in California and throughout the United States.

17 46. Defendants intend to continue to make similar automated and/or prerecorded calls
18 to persons on their cellular telephones in California and throughout the United States.

19 **D. Factual Allegations Regarding Plaintiff Sanders**

20 47. In or around 2014, Plaintiff Sanders had her vehicle serviced by Defendant
21 Normandin.

22 48. After having her vehicle serviced in 2014, Plaintiff Sanders received
23 approximately five (5) to six (6) telephone solicitation calls on her cellular telephone, number
24 (408) 499-XXXX, made by Defendant OneCommand on behalf of Defendant Normandin.

25 49. Each of the calls was initiated for purposes of marketing Normandin's services.
26
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1 50. Each of the calls consisted of a prerecorded message stating words to the effect
2 that Plaintiff Sanders' vehicle was overdue for service.

3 51. On information and belief, the script of prerecorded message was very similar, or
4 identical, to the message in paragraph 29, above.

5 52. Defendant OneCommand made the above-described automated and/or
6 prerecorded calls.

7 53. Plaintiff Sanders did not provide prior express consent to receive automated
8 and/or prerecorded calls on her cellular telephone from, or on behalf of, Defendants.

9 54. Plaintiff Sanders' privacy has been violated by the above-described calls from, or
10 on behalf of, Defendants and they constitute a nuisance as they are annoying and harassing.

11 55. Defendants, in concert, have made thousands of automated and/or prerecorded
12 calls to persons on their cellular telephones in California and throughout the United States.

13 56. Defendants intend to continue to make similar automated and/or prerecorded calls
14 to persons on their cellular telephones in California and throughout the United States.

15 57. Plaintiffs and all members of the Class, defined in Paragraph 58, below, have
16 been harmed by the acts of Defendants because their privacy has been violated, they were subject
17 to annoying and harassing calls that constitute a nuisance, and they were charged for incoming
18 calls.

19 VI. CLASS ACTION ALLEGATIONS

20 58. Class Definition. Pursuant to CR 23(b)(2) and (b)(3), Plaintiffs bring this case as
21 a class action on behalf of the following Class:

22 All persons who owned one or more of the 8,313 cellular telephone
23 numbers to which calls were placed by OneCommand on
24 Normandin's behalf on or after October 16, 2013, through the
25 alleged use of any automatic telephone dialing system or with an
26 artificial or prerecorded voice, which calls allegedly were not made
27 for emergency purposes or with the recipient's prior express
consent.

1 Excluded from the Settlement Class are the Judge to whom the Action is assigned and any
2 member of the Judge's staff and immediate family.

3 59. Numerosity. The Class is so numerous that joinder of all members is
4 impracticable. On information and belief, the Class has 8,313 members. Moreover, the
5 disposition of the claims of the Class in a single action will provide substantial benefits to all
6 parties and the Court.

7 60. Commonality. There are numerous questions of law and fact common to
8 Plaintiffs and members of the Class. These common questions of law and fact include, but are
9 not limited to, the following:

10 a. Whether Defendants and/or their affiliates, agents, and/or other persons or
11 entities acting on Defendants' behalf violated 47 U.S.C. § 227(b)(1)(A) by making any call,
12 except for emergency purposes, to a cellular telephone number using an ATDS or artificial or
13 prerecorded voice;

14 b. Whether Defendants and/or their affiliates, agents, and/or other persons or
15 entities acting on Defendants' behalf knowingly and/or willfully violated 47 U.S.C.
16 § 227(b)(1)(A) by making any call, except for emergency purposes, to a cellular telephone
17 number using an ATDS or artificial or prerecorded voice, thus entitling Plaintiffs and the Class
18 to treble damages;

19 c. Whether Defendants are liable for ATDS generated and/or automated or
20 prerecorded calls promoting Defendants' products and/or services made by Defendants'
21 affiliates, agents, and/or other persons or entities acting on Defendants' behalf;

22 d. Whether Defendants and/or their affiliates, agents, and/or other persons or
23 entities acting on Defendants' behalf should be enjoined from violating the TCPA in the future.

24 61. Typicality. Plaintiffs' claims are typical of the claims of the Class. Plaintiffs'
25 claims, like the claims of Class arise out of the same common course of conduct by Defendants
26 and are based on the same legal and remedial theories.

1 62. Adequacy. Plaintiffs will fairly and adequately protect the interests of the Class.
2 Plaintiffs have retained competent and capable attorneys with significant experience in complex
3 and class action litigation, including consumer class actions and TCPA class actions. Plaintiffs
4 and their counsel are committed to prosecuting this action vigorously on behalf of the Class and
5 have the financial resources to do so. Neither Plaintiffs nor their counsel have interests that are
6 contrary to or that conflict with those of the proposed Class.

7 63. Predominance. Defendants have engaged in a common course of conduct toward
8 Plaintiffs and members of the Class. The common issues arising from this conduct that affect
9 Plaintiffs and members of the Class predominate over any individual issues. Adjudication of
10 these common issues in a single action has important and desirable advantages of judicial
11 economy.

12 64. Superiority. A class action is the superior method for the fair and efficient
13 adjudication of this controversy. Classwide relief is essential to compel Defendants to comply
14 with the TCPA. The interest of individual members of the Class in individually controlling the
15 prosecution of separate claims against Defendants is small because the damages in an individual
16 action for violation of the TCPA are small. Management of these claims is likely to present
17 significantly fewer difficulties than are presented in many class claims because the calls at issue
18 are all automated. Class treatment is superior to multiple individual suits or piecemeal litigation
19 because it conserves judicial resources, promotes consistency and efficiency of adjudication,
20 provides a forum for small claimants, and deters illegal activities. There will be no significant
21 difficulty in the management of this case as a class action.

22 65. Injunctive and Declaratory Relief Appropriate. Defendants have acted on
23 grounds generally applicable to the Class, thereby making final injunctive relief and
24 corresponding declaratory relief with respect to the Class appropriate on a classwide basis.
25 Moreover, on information and belief, Plaintiffs allege that the automated calls made by
26 Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants'
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1 behalf that are complained of herein are substantially likely to continue in the future if an
2 injunction is not entered.

3 **VII. FIRST CLAIM FOR RELIEF**
4 **(Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A))**

5 66. Plaintiffs reallege and incorporate by reference each and every allegation set forth
6 in the preceding paragraphs.

7 67. The foregoing acts and omissions of Defendants and/or their affiliates, agents,
8 and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple
9 violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency
10 purposes, to the cellular telephone numbers of Plaintiffs and members of the Class using an
11 ATDS and/or artificial or prerecorded voice.

12 68. As a result of Defendants' and/or their affiliates, agents, and/or other persons or
13 entities acting on Defendants' behalf's violations of the TCPA, 47 U.S.C. § 227(b)(1)(A),
14 Plaintiffs and members of the Class presumptively are entitled to an award of \$500 in damages
15 for each and every call to their cellular telephone numbers using an ATDS and/or artificial or
16 prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

17 69. Plaintiffs and members of the Class are also entitled to and do seek injunctive
18 relief prohibiting Defendants and/or their affiliates, agents, and/or other persons or entities acting
19 on Defendants' behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls,
20 except for emergency purposes, to any cellular telephone numbers using an ATDS and/or
21 artificial or prerecorded voice in the future.

22 **VIII. SECOND CLAIM FOR RELIEF**
23 **(Knowing and/or Willful Violations of the Telephone Consumer Protection Act, 47 U.S.C.**
24 **§ 227(b)(1)(A))**

25 70. Plaintiffs reallege and incorporate by reference each and every allegation set forth
26 in the preceding paragraphs.

27 71. The foregoing acts and omissions of Defendants and/or their affiliates, agents,
and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple

1 knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls,
2 except for emergency purposes, to the cellular telephone numbers of Plaintiffs and members of
3 the Class using an ATDS and/or artificial or prerecorded voice.

4 72. As a result of Defendants' and/or their affiliates, agents, and/or other persons or
5 entities acting on Defendants' behalf's knowing and/or willful violations of the TCPA, 47 U.S.C.
6 § 227(b)(1)(A), Plaintiffs and members of the Class are entitled to treble damages of up to
7 \$1,500 for each and every call to their cellular telephone numbers using an ATDS and/or
8 artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

9 73. Plaintiffs and members of the Class are also entitled to and do seek injunctive
10 relief prohibiting Defendants and/or their affiliates, agents, and/or other persons or entities acting
11 on Defendants' behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls,
12 except for emergency purposes, to any cellular telephone numbers using an ATDS and/or
13 artificial or prerecorded voice in the future.

14 **IX. PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs, on their own behalf and on behalf of the members of the Class,
16 pray for judgment against Defendants as follows:

- 17 A. Certification of the proposed Class;
- 18 B. Appointment of Plaintiff Brinker, Plaintiff Rugg, and Plaintiff Sanders as
19 representatives of the Class;
- 20 C. Appointment of the undersigned counsel as counsel for the Class;
- 21 D. A declaration that Defendants and/or their affiliates, agents, and/or other related
22 entities' actions complained of herein violate the TCPA;
- 23 E. An order enjoining Defendants and/or their affiliates, agents, and/or other related
24 entities, as provided by law, from engaging in the unlawful conduct set forth herein;
- 25 F. An award to Plaintiffs and the Class of damages, as allowed by law;
- 26
- 27

1 G. An award to Plaintiffs and the Class of attorneys' fees and costs, as allowed by
2 law and/or equity;

3 H. Leave to amend this Complaint to conform to the evidence presented at trial; and

4 I. Orders granting such other and further relief as the Court deems necessary, just,
5 and proper.

6 **X. DEMAND FOR JURY**

7 Plaintiffs demand a trial by jury for all issues so triable.

8 RESPECTFULLY SUBMITTED AND DATED this 29th day of September, 2017.

9 TERRELL MARSHALL LAW GROUP PLLC

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